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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DONALD NUNEZ, JR., Defendant and Appellant.	E069564 (Super.Ct.No. FWV17002264) OPINION

APPEAL from the Superior Court of San Bernardino County. Ingrid Adamson Uhler, Judge. Affirmed in part; reversed in part with directions.

Steven S. Lubliner, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Melissa Mandel and Adrian R. Contreras, Deputy Attorneys General, for Plaintiff and Respondent.

Following a jury trial, defendant and appellant Donald Nunez, Jr., was convicted of one count of first degree burglary (Pen. Code, § 459)[1] and misdemeanor vandalism (§ 594, subd. (b)). In a bifurcated proceeding, defendant admitted, and the trial court found true, eight prison priors within the meaning of section 667.5, subdivision (b). The trial court struck three of the eight enhancements pursuant to section 1385 and sentenced defendant to state prison for nine years. The court further awarded victim restitution in the amount of $400. On appeal, defendant challenges (1) the sufficiency of the evidence to support his conviction of burglary, (2) the imposition of an enhancement, and (3) the amount of restitution. Although we reject his first challenge, we agree the imposition of one of the enhancements was in error, and the amount of restitution awarded is not supported by the record. We remand the matter for further proceedings.

I. PROCEDURAL BACKGROUND AND FACTS

Defendant and the victim are married with two children; however, in November 2016, they separated. In May 2017, the victim lived with their children, in a borrowed travel trailer, parked in the storage area of her brother's automotive shop, in Rancho Cucamonga.[2] The victim did not want defendant to know where she was living.

During the evening of May 30, 2017, defendant appeared at the premises where the victim's trailer was located. The two spoke until defendant became aggressive,

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] Defendant did not have a key to the trailer or permission to go inside.

and the victim told him to leave. The victim went inside the trailer, and defendant yelled for her to come outside to talk. When she tried to close a kitchen window to keep him out, he struggled against her efforts, popped a screen out, and broke the window. He moved and broke another window near the bedroom. A 911 call was made, and the victim told defendant she was calling the police. Returning to the broken kitchen window, he reached inside the trailer and stole a set of keys. The keys were to the victim's brother's shop, and the keys would allow the victim to open the gate and operate the security alarm. When the police arrived, defendant had already left.

The next day, a deputy sheriff interviewed defendant. When asked why he took the keys, defendant said: "They were just there, they were just there, talking to her." He acknowledged that he took the keys from the trailer and stored them in the middle console of his vehicle.

The victim paid $400 to repair the two windows. The receipt for the repairs was introduced at trial. The victim's brother's company acted as the "middle man," and arranged for the repairs. The brother paid a subcontracted company $310 for the repair and installation of the windows, and "mark[ed] up the invoice by 20 percent," as was his usual practice.

II. DISCUSSION

A. Sufficient Evidence Supports Defendant's Burglary Conviction.

Defendant contends his burglary conviction cannot stand because it was not supported by substantial evidence that he intended to commit a felony when he entered

the trailer. However, intent to commit a felony is not absolutely required for a burglary conviction. Intent to commit petty theft also supports a burglary conviction. (See § 459 ["Every person who enters any house . . . with intent to commit grand or *petit larceny* or any felony is guilty of burglary." (Italics added.)].) Here, there was enough evidence for the jury to find that when he entered the trailer, defendant intended to steal the keys, albeit simply to compel the victim to talk to him. Thus, the burglary conviction stands.

"Our task is clear. 'On appeal we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] The standard of review is the same in cases in which the People rely mainly on circumstantial evidence. [Citation.] "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt. '"If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment."' [Citations.]" [Citation.]' [Citations.] The conviction shall stand 'unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]."'" (*People v. Cravens* (2012) 53 Cal.4th 500, 507-508.)

Defendant summarizes the testimony of the witnesses in his statement of facts, but then relies solely on his own self-serving testimony, his statement to officers, and his actions, to argue insufficient evidence of intent to commit theft. He claims that what he "did and did not do with the keys after the taking proves this is not and never was a theft case." He points out that he "did not use them for some criminal purpose. He did not sell them to a thief or a fence. He did not realize his error and get rid of them so he could deny having taken them. He kept them. Confronted by the officers, he did not deny possession or insist that the officers get a search warrant; he said the keys were in his vehicle and told the officers where his keys to the vehicle were. Told by the officers that the keys he took were [the victim's brother's, defendant] said that he had been trying to talk to [the victim] about that." He asserts that he "obviously intended to return the keys, albeit while bothering [the victim] in the process."

"Contrary to what he claims, defendant's self-serving testimony was not the only evidence of his intent . . . . 'Because intent is rarely susceptible of direct proof, it may be inferred from all the facts and circumstances disclosed by the evidence. [Citations.] Whether the entry was accompanied by the requisite intent is a question of fact for the [fact finder]. [Citation.] "Where the facts and circumstances of a particular case and the conduct of the defendant reasonably indicate his purpose in entering the premises is to commit larceny or any felony, the conviction may not be disturbed on appeal."'" (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1574.)

Here the facts, circumstances, and defendant's conduct reasonably indicate that his intent was to take the victim's keys and keep them in order to impede her efforts to

avoid him. Whether taking the victim's keys or impairing her right of exclusive possession and use of her trailer, defendant's act constitutes theft, regardless of his reason—motive—for doing so. (*People v. Avery* (2002) 27 Cal.4th 49, 54-58 [intent to steal includes intent to deprive the owner of property only temporarily, but for so extended a period of time as to deprive the owner of a major portion of its value or enjoyment]; *People v. Kwok* (1998) 63 Cal.App.4th 1236, 1249-1251 [temporary removal of a door lock for the purpose of making a duplicate house key constitutes theft].) Nonetheless, defendant asserts that his stealing the keys is analogous to "a childish game of keep-away." This assertion confuses motive with intent. "[W]ith few exceptions, motive itself is not an element of a criminal offense." (*People v. Smith* (2005) 37 Cal.4th 733, 740; see CALCRIM No. 370 ["The People are not required to prove that the defendant had a motive to commit any of the crimes charged."].) While evidence of motive to steal does not establish the specific intent element of burglary, it is relevant to the issue of intent to steal. (CALCRIM Nos. 370 [motive], 1700 [burglary].)

Regarding defendant's claim that no one testified about being deprived of a "major portion or value or enjoyment of the keys," we note that defendant took the keys on May 30, 2017, and an officer recovered them one day later, on May 31. While the keys were in defendant's possession, the victim was deprived of their use and the security of knowing defendant could not gain access to her. Despite the short period of deprivation, there is sufficient evidence to conclude defendant took the keys with

the requisite intent. Therefore, his burglary conviction is supported by substantial evidence.

B. Defendant Is Entitled to Resentencing Since One of his Prior Felony Convictions was Reduced to a Misdemeanor under Proposition 47.

Defendant contends, and the People concede, one of his prison priors (case No. FWV036692) must be stricken as invalid, and the case must be remanded for resentencing. We agree.

Defendant's original sentence included five consecutive one-year enhancements imposed for his prior felony prison commitments under section 667.5, subdivision (b), including one for receiving stolen property in case No. FWV036692.[3] "'Imposition of a sentence enhancement under [section 667.5, subdivision (b),] requires proof that the defendant: (1) was previously convicted of a felony; (2) was imprisoned as a result of that conviction; (3) completed that term of imprisonment; and (4) did not remain free for five years of both prison custody and the commission of a new offense resulting in a felony conviction.' [Citation.] When found to be true, imposition of the one-year

[3] The first amended information alleged eight prior felony prison commitments: case Nos. FWV012551, FWV14323, FWV020168, FWV025921, FWV030920, FWV036692, FCH700491, and FWV1100642. Defendant admitted seven of the allegations, all parties agreed that the first two (FWV012551 and FWV14323) arose from a single commitment, and the trial court struck the first two.

consecutive sentence enhancement is 'mandatory unless stricken.'" (*People v. Baldwin* (2018) 30 Cal.App.5th 648, 653.)

In 2016, defendant's prior in case No. FWV036692 was reduced to a misdemeanor under Proposition 47.[4] Since the sentence enhancement based on case No. FWV036692 requires an underlying felony, once the felony is reduced to a misdemeanor, there is a missing element to trigger it. (§ 1170.18, subd. (k); *People v. Buycks* (2018) 5 Cal.5th 857, 879 ["[A] defendant who successfully petitions for resentencing on a current Proposition 47 eligible conviction may, at the time of resentencing, challenge a felony-based enhancement contained in the same judgment because the prior felony conviction on which it was based has since been reduced to a misdemeanor."]; see *id*. at pp. 888-890.) Because the trial court should not have imposed the enhancement for case No. FWV036692, we must remand for resentencing so the trial court may reconsider the entire sentence. (*People v. Baldwin*, *supra*, 30 Cal.App.5th at p. 657 [full resentencing as to all counts is proper as the court may have made a different decision on defendant's other prison priors had it known it could not impose an enhancement on this one].) Defendant's resentencing is subject to the

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[4] "Proposition 47 reduced most possessory drug offenses and thefts of property valued at less than $950 to straight misdemeanors and created a process for persons currently serving felony sentences for those offenses to petition for resentencing (§ 1170.18)." (*People v. Baldwin*, *supra*, 30 Cal.App.5th at p. 652.)

On January 4, 2019, defendant requested we take judicial notice of the minute order in case No. FWV036692 granting his Proposition 47 petition. We grant the request. (Evid. Code, §§ 452, subd. (d) [permitting judicial notice of court records] & 459; Cal. Rules of Court, rule 8.252, subd. (a).)

requirement that he may not receive an aggregate sentence greater than that previously imposed. (*Id*. at pp. 657-658.)

C. The Trial Court Abused Its Discretion in Awarding $400 in Victim Restitution.

Defendant contends the trial court abused its discretion in ordering victim restitution in the amount of $400. He claims the amount was improper because the jury convicted him of misdemeanor vandalism, specifically finding the amount of damage was less than $400, and the evidence shows, at most, a loss of $372. We agree.

"In California, crime victims have a constitutional right to seek restitution for 'the losses they suffer' from the defendant who inflicted those losses. [Citation.] To effectuate this right, the Legislature requires courts to order that 'the defendant make restitution to the victim or victims' 'in every case in which a victim has suffered economic loss *as a result of the defendant's conduct*.'" (*People v. Walker* (2014) 231 Cal.App.4th 1270, 1273-1274; see § 1202.4, subd. (f)(3)(A) [victim restitution shall "fully reimburse the victim . . . for every determined economic loss incurred as the result of the defendant's criminal conduct, including," "the actual cost of repairing the property when repair is possible"].) However, "[w]hen judgment is imposed and the defendant sentenced to a period of incarceration (in prison or jail), the court may order restitution *only for losses arising out of the* '*criminal conduct for which the defendant has been convicted.*'" (*Walker*, at p. 1274, italics added.)

"Trial courts have broad discretion to order victim restitution and such an order will not be reversed if there is a 'factual and rational basis for the amount of restitution.' [Citation.] A court's discretion is not unlimited, however, and an order will be reversed if it is arbitrary or capricious." (*People v. Rubics* (2006) 136 Cal.App.4th 452, 462, overruled on other grounds in *People v. Martinez* (2017) 2 Cal.5th 1093, 1107, fn. 3.) Here, defendant's relevant criminal conduct is residential burglary and misdemeanor vandalism. When a defendant is sentenced to prison, victim restitution must flow from the conduct of which the defendant was convicted; it may not be imposed to nullify acquittals. (*Rubics*, at p. 460.) Since the jury convicted defendant of misdemeanor vandalism and specifically found the amount of damage to be less than $400, the trial court abused its discretion in imposing victim restitution in that amount. (*People v. Walker, supra,* 231 Cal.App.4th at p. 1274.) We reject the People's attempt to attach the restitution order to the residential burglary conviction. The alleged $400 in property damage was plead and tried as an enhancement to the vandalism charge, not the residential burglary charge. Since the evidence sets the amount to be $372 ($310 plus $62 [$310 x 0.20 = $62]), the trial court shall modify the victim restitution order to reflect that defendant pay the victim $372.

III. DISPOSITION

The sentence is reversed, the matter is remanded for the trial court to recalculate and reimpose sentence, and to modify the victim restitution order in accordance with the views expressed in this opinion. The court shall then forward a copy of the modified abstract of judgment and restitution order to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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McKINSTER
J.

We concur:

RAMIREZ
P. J.

FIELDS
J.